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IN THE

Supreme Court of the United States.

No. 88.

U. X. GUNTER, JR., ATTORNEY-GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL., APPELLANTS,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEES.

Appellants' Additional Brief in Reply to Argument of Appellees.

The appellees assume the position that the appearance of an attorney-general in a suit in which one of the tax officers of South Carolina was a defendant, causes the State to be subjected to the jurisdiction of the court and the judgment binds the State, relying upon the case of the State of South Carolina *vs.* Corbin & Stone, 16 S. C. 533. That was a case in which the suit was brought by the State for the recovery of money in the hands of the defendants, and was expressly authorized by statute. To cite the case in full, I cite the following:

"Before considering these questions, however, it will be proper to dispose of the question which lies at the threshold of the case, as to the authority of the attorney-general to institute this action. In 1873 Attorney-

General Melton, under 'An act to fix the salary and define the duties of the attorney-general' (Gen. Stat. 109, sec. 26), which empowers the attorney-general, when in his judgment the interests of the State require it, to file and prosecute proceedings against persons who intrude upon the lands, rights, or property of the State, . . . commenced proceedings against the South Carolina Phosphate Company, Limited, or the 'Oak Point Mines,' for intruding upon the rights of the State by mining and removing from North Wimbee Creek, a navigable stream, phosphate rock, the property of the State, and prayed judgment for the value of the rock removed, and for perpetual injunction. . . . The appellants, with Attorney-General Melton, represented the State. Under an order of court in that proceeding, this company paid to appellants the sum of $28,000. Of this amount they paid to the treasurer in June, 1877, $206.06, retaining the balance as fees for professional services, viz: $17,737.34 in that case, and $10,056.60 in another. Attorney-General Conner, at the instance of Comptroller-General Hagood, in August, 1877, brought action to recover this money, thus retained by appellants as counsel fees, claiming that appellants, under the order of the court hereafter to be considered, were entitled to retain only the sum of $3,700. This action thus commenced by Attorney-General Conner has been continued by Attorney-General Youmans, and is the one now before the court.

There can be no doubt but that Attorney-General Melton, under section 5 of the act above referred to (Gen. Stat. 110), had authority, on his own motion, to commence the action against the phosphate company, which resulted in the recovery of the money here sued for. This section is as follows: "He may, when, in his judgment, the interests of the State require it, file and prosecute information or other process against persons who intrude upon the lands, rights, or property of the

State." This gave Attorney-General Melton full authority to act in the original suit, and we think the act is wide enough to vindicate the action of Attorney-General Conner in instituting this suit and Attorney-General Youmans in prosecuting it. This suit may well be regarded as an incident to the action against the phosphate company. It is intended to gather the fruits of that action, and was rendered necessary as a result thereof.

Besides, if the appellants illegally withhold the State's money claimed at their hands, why is not this a violation of the act above cited? Money is property, and if appellants are illegally in possession of the State's money and refuse to deliver it, why, in contemplation of law, may they not be regarded as having intruded themselves upon the property of the State and thereby made themselves liable under the act above referred to?

But, in addition to this, the attorney-general is especially required to "defend the rights of the State in all cases where its rights are involved." (Gen. Stat. 110, sec. 35.) The prosecution of a claim in behalf of the State is defending its rights. In fact, inasmuch as the State is seldom or never a defendant in a cause, the only, or, at least, the general way in which he may be called upon to defend its rights, is by prosecuting its claims as plaintiff."

In act of 1868, under which the authority to prosecute this action was given, sections 2 and 3 of the act, found on page 88 of 14 Statutes at Large, are as follows:

> "Sec. 2. He shall appear for the State in the Supreme Court in the trial and argument in said court of all causes, criminal and civil, in which the State is a party or interested, and in such causes, in any court or tribunal, when required by the governor or either branch of the general assembly.
>
> "Sec. 3 He may, when, in his judgment, the interest of the State requires it, file and prosecute

information or other process against persons who intrude upon the lands, rights, or property of the State, or commit or erect any nuisance thereon."

But in this case, although they held that under the clear authority given, the attorney-general had the right to prosecute the action in the name of the State, still, although he had brought the State into court, he can not allow a suit for a counter-claim to be maintained in that very action against the State. The court is emphatic in its decision on this question. We cite as follows:

"Next, did the judge err in holding that the State could not be sued in her own courts, and on that ground in ruling out the counter-claims of appellants? It is hardly necessary to discuss the question as to the right of an individual to sue the State directly. That no such right exists is universally admitted. However righteous, just, and meritorious the claim may be, the courts can afford no remedy. The State, in her sovereignty, will do justice at her own will, and not by the intervention of her courts. The courts are of her own creation and for her citizens. Treasurers *vs.* Cleary, 3 Rich. 374; State *vs.* Baldwin, 14 S. C. 138."

"But, whatever may have been decided elsewhere, in the face of our own cases of the Treasurers *vs.* Cleary and the State *vs.* Baldwin, we can not do otherwise than hold that the claim of appellants had no legal status in the court below. It is universally admitted that a State cannot be sued in its courts without its consent. Our courts have decided that a counter-claim is a suit. It is so recognized in this case by the appellants in their motion for judgment on the failure of the State to answer their counter-claim, and can not be set up.

"There can be no doubt, however, that there is an underlying principle of justice, which might permit

defendants, under proper regulations, to have their claims against the State, if any, considered and passed upon by the same tribunal before which they may be summoned to answer the State. And, if we might presume to suggest, it may be wise for the general assembly to enact some remedy in such cases. Until then we must declare the law as it stands. Our province is judicial, not legislative."

The State of South Carolina *vs.* Corbin & Stone, 16 S. C. This shows that, though he could start an action for the State, he could not, by *appearing for the State, give jurisdiction to a claim against the State.*"

So, the case of the State of South Carolina *vs.* Corbin & Stone does not only not sustain counsel's position that the appearance of the attorney-general in any suit will bind the State, but it shows that the rule is to the contrary, and the position that the fact that he had reported this action which he had brought to the legislature, and it had not directed him to discontinue the action, is a presumption raised in favor of the State's interest; but the silence of a State does not allow a presumption to be raised against its interest because no action has been taken. The dereliction of an officer or of a legislature in taking no action can not be construed into an estoppel against the State when it attempts to correct any misdeeds and assert its rights.

Now, as to citation of counsel from 14 Statutes at Large, page 367, we desire to give the entire three sections. These are sections enacted for the purpose of devising a method for the recovery of taxes when erroneously paid, and are as follows:

> "Sec. 6. Whenever any person, or persons, charged with taxes upon the books of any tax collector in this State, shall state, in writing, to said collector that he, or they, have been erroneously or illegally charged with the same, said collector shall submit to the county auditor a full statement of the facts in the case, which

statement shall be forwarded to the State auditor, with such additional information, relating thereto, as the said county auditor may be able to give; and said tax collector shall not be required to proceed against the party or parties so claiming to have been erroneously or illegally charged with taxes, by distress or otherwise, until the State auditor shall, in writing, direct him so to do.

"Sec. 7. In any action or proceeding against any tax collector in this State, for the purpose of recovering any property or money alleged to have been erroneously or illegally assessed and collected, the party bringing such action or proceeding shall make it appear that notice in writing of the claim on which such suit may be brought was given to said tax collector in pursuance of the sixth (6th) section of this act; and unless it shall be made to appear that said collector has proceeded contrary to the provisions of this act, the amount recovered in such suit shall not exceed the value of the property or money aforesaid.

"Sec. 8. It shall be the duty of the attorney-general of the State to defend any suit or proceeding against any tax collector, or other officer, who shall be sued *for moneys collected*, or *property levied on*, or *sold on account of* any tax, *when the State auditor shall have ordered such collector to proceed* in the collection of any such tax, after notice as aforesaid, or suit brought; and any judgment against such collector or other officer, finally recovered, shall be paid in the manner provided in section 81 of the act to provide for the assessment and taxation of property aforesaid."

It will be noticed that the attorney-general is given the right and it is prescribed as his duty to defend his suit against a tax collector sued for *moneys collected* or *property levied upon*, and the conferring of that power upon him in that instance makes it clearer that in other instances of litigation against tax collectors he has not

the power to appear, and the case of Pegues *vs.* Humphreys was not one of the cases specified in this statute. Neither would the judgment, even if it were specified, be binding upon the State, as we understand the law. In the case of *Ex parte Dunn, in re Hand vs. Savannah & Charleston R. R. Company, 8 South Carolina, at page* 207, we find that there was a statute expressly authorizing the attorney-general to appear and bring suit and bind the State in certain railroad litigation. In this case, pursuant to the express authority given to appear, he appeared and certain judicial proceedings were had and judgment rendered, and when the petition of Dunn was filed the position was taken that the judgment which had been obtained, with the attorney-general participating, bound the State of South Carolina. The Supreme Court in an able opinion said:

> "The Attorney-General, although a law officer of the State, in fact properly belongs to its executive department, and has *no more power to control the State by his action in court than the Governor or the Comptroller-General.* Indeed, when a State can be made a party in the Supreme Court of the United States, the process to that end must be served on the Governor."

It seems to us that this is conclusive of the position that the appearance of the Attorney-General in Pegues *vs.* Humphreys bound the State. I cite further in the opinion of Hand *vs.* Savannah & Charleston Railroad Co., supra, the following: "The power conferred on the attorney-general to bind the State by appearing in any action against any railroad company must be held to refer only to cases of a nature similar to those he was authorized to bring under the act and must be confined to the purpose which it was intended to accomplish. The end proposed by the act was an enforcement of the lien given

to the State to secure its guaranty. It contemplated no purpose of a different character. *Will it be claimed that the attorney-general, by so appearing, could bind the State to any order which should be made in the cause, even to the discharge and release of the lien of the State, while at the same time it should be ordered to pay the bonds which it had guaranteed? The right of appeal would be no safeguard, for the appeal could only be taken and perfected by the attorney-general himself, who it is not natural or likely to suppose would move against an order to which he had consented, even if such a course would be consistent with the practice of the courts.*

"How, then, can it be contended that a right secured to the State, in full consideration, on its part, to take possession of certain property by a designated officer, can be lost by the consent of another of its officers, the attorney-general?"

This last citation discusses the law relative to a case where explicit authority is given for the attorney-general to appear and bind the State, and still it was held that it must be in a case exactly in conformity with the cases enumerated in the statute before his appearance and consent would be binding.

If the State had itself been made a party defendant, the Attorney-General would have to appear for it, under the law, and answer. Can it be contended that the fact that he appeared gave the court jurisdiction and the judgment would bind the State? If it is contended that his appearance bound the State *when it was not a party, wouldn't it do it equally when it is a party?*

Now, as to the point made in appellees' discussion of the 12th assignment of error, that our position that this is a proceeding to restrain State officers from prosecuting a suit on behalf of the State would be well taken if it were an original action, but that it is not well taken,

inasmuch as this is an attempt to make the party named amenable to a decree already rendered in an action in which they were not parties, I will say that that position is demolished by the reasoning and decision in the case of In re Ayres, 123 U. S. 443, which is fully cited in pages 31 and 32 of my original brief. There the plaintiffs obtained a decree in a suit in which the attorney-general was one of the defendants, enjoining him from bringing suit for taxes under a similar statute to this, and also enjoining the tax collector from proceeding to levy on property for taxes. The attorney-general, in defense of the decree, institutes his action according to the statutes directing him to do so, whose constitutionality was challenged just as the statute under which we are proceeding is challenged. In furtherance of the enforcement of the decree rendered by Judge Bond, he was ruled and attached for contempt, and the Supreme Court of the United States discharged him on the ground that it was a proceeding practically against the State, for the reason that it restrained all its officers, in fact restrained the State itself from prosecuting its case. There is no difference between that case and this, except that the attorney-general was there a party to the suit in which the original decree was rendered, while here he was not a party, which makes our case stronger even than the case of Ayres.

In our case the attorney-general was not a party. No injunction was issued against his prosecuting the action. The only injunction was against the issuance of process by the tax collectors. In Ayres case he was a party, and tax collectors were enjoined from issuing process and Ayres as attorney-general from bringing suit. Still the court held he was at perfect liberty to go ahead. They could not bind the State by enjoining the legal department. Here the same reasoning applies with greater force.

W. F. STEVENSON,
For Appellants.